

MEDICAID, ELECTIVE SHARES, AND THE GHOSTS OF TENURES PAST

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INTRODUCTION

For longer than most lawyers remember to remember, the right of a surviving spouse to a share in the deceased spouse's estate stood, unassailable, doing double-duty as a protection against spousal impoverishment and as a limit on a spouse's ability to deplete the children's share of the decedent's estate.¹ Although it may yet accomplish the latter, its ability to prevent the impoverishment of the widowed withers in the face of present-day Medicaid regulations. These regulations now require a surviving spouse to elect and consume that statutory share, even if it completely disrupts an estate plan established perhaps decades ago. The value of the elective share will be counted as if it were available to the widowed spouse even if the election is never made.²

This is not a new development. Legislators and administrators have struggled for forty years to ensure that Medicaid benefits are paid only to those who meet the criteria for financial need. If an applicant is not already "financially needy" at the time of application—or financially needy *enough*—then Medicaid benefits will be denied until the applicant has spent down all "available resources."³ The definition of "available resources" has expanded over the years as Medicaid administrators try to thwart applicants' efforts to voluntarily impoverish themselves through gratuitous transfers.⁴ The primary method for doing so is the use of two major categories for classifying assets: those actually owned, and those not owned but subject to an enforceable claim.⁵ These categories then are coupled with an "applicable look-back period" to take account of assets (or claims) that the applicant transferred in the recent past.⁶ Disclaimer of inheritances, failure to enforce judgments, establishment of trusts by third parties, and refusal to elect the statutory spousal share all will result in the count-

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1. See *infra* notes 176-223 and accompanying text.
2. See *infra* notes 114-19 and accompanying text.
3. See *infra* notes 49-57 and accompanying text.
4. See *infra* notes 64-113 and accompanying text.
5. See *infra* notes 67-74 and accompanying text.
6. *Id.*

ing of assets never owned by the applicant.⁷ These rules were expanded several times, so much so that today, administrators may disregard certain traditional concepts of “property,” even when there is no evidence that the transfer of resources was done with the intent to qualify for Medicaid.⁸ This means that assets can be counted as “available” even when they are not owned, never were owned, and never have been subject to any enforceable claim by the applicant.⁹

This willingness to call something “property” when it lacked all the traditional hallmarks has now led to even stranger results. In 2003, the Kansas Supreme Court found valid a Medicaid decision to count as “available resources” certain assets that were placed in trust pursuant to a pre-mortem waiver of spousal election rights—even though the waiver in question took place almost 20 years before the plaintiff ever applied for Medicaid benefits.¹⁰ The court’s analysis in *Miller v. Kansas Department of Social and Rehabilitation Services* is filled with raging indignation toward taxpayers who scheme to avoid true financial need before qualifying for Medicaid benefits, even though there was little or no evidence that the plaintiff in question ever had any such intent.¹¹ The court ignores the fact that the waived elective share right was neither owned outright nor an enforceable claim, either at the time the widow applied for Medicaid or within the applicable look-back period.¹² Instead, the court relies on legerdemain to reach its desired conclusion, thus further muddying traditional analysis of property rights to the point where the concept of “property” itself seems to be empty of independent meaning, teetering on the verge of absurdity.¹³

This assault upon our most fundamental common law ideas, even if required by contemporary circumstances, is disturbing and hard to understand, but there is more going on here than a bad job of legal analysis. Voluntary impoverishment to qualify for Medicaid benefits is a singular phenomenon in this country. The people who engage in the practice are not just the extremely wealthy, nor are they the villainous schemers that some would try to paint them to be.¹⁴ They are the exact same citizens who would never consider falsifying income tax filings, or hiding assets from their spouses, or lying in order to

7. *Id.*

8. *See infra* notes 92-99 and accompanying text.

9. *Id.*

10. *Miller v. Kansas Dept. of Social and Rehabilitation Servs.*, 64 P.3d 395 (Kan. 2003).

11. *See, e.g., Miller*, 64 P.3d at 401.

12. *See generally Miller*, 64 P.3d at 395, *passim*.

13. *See infra* notes 172-75 and accompanying text.

14. *See infra* notes 58-63 and accompanying text.

qualify for housing assistance, or even stealing office supplies.¹⁵ They are the exact same citizens who find such practices scandalous and immoral. And yet there seems to exist a widely accepted belief that if a person can qualify for Medicaid without first depleting everything he has saved through a lifetime of labor, then not only *may* he do so, he may even owe a duty to his heirs to do so.¹⁶ There seems no apparent explanation for this unusual willingness to defraud the government, especially among people who would never even consider such tactics in any other context.

This article will attempt to understand this phenomenon in light of the common law's evolving conceptions of "property," particularly as these are reflected in the history of the elective share and its ancestor, dower.¹⁷ The tensions between competing demands for resources that operated to flatten and then bury the feudal hierarchy of William the Conqueror seem to have resurfaced in the problem of "Medicaid planning." Although strange to contemporary concepts of ownership and trade in a free market, these ancient ideas of "property" help us understand the current antagonism between legislative policy and popular resistance to that policy.¹⁸ Like the original image on a canvas that an artist decides to paint over, the passage of time and the pressures created by unimagined high costs of such care may have called forth something very ancient—the sense that "property" may not be a *thing* at all, and that "property rights" may not be natural rights that we possess as individuals in some pre-social context, but that both point instead to a complex system of mutual and reciprocal obligations that develops as the State and its citizens struggle to allocate scarce resources among them.

I. AGING IN AMERICA: LIVE LONG AND IMPOVERISH

State officials throughout the United States estimate that the combined state and federal costs of Medicaid total about \$300 billion a year and account for an average of roughly 20 percent of state budgets.¹⁹ In 2011, the first of America's 76 million "baby boomers" will turn 65.²⁰ This represents an astounding shift in age distribution in America over the past century. In 1900, only four percent of Ameri-

15. *Id.*

16. *Id.*

17. *See infra* notes 176-223 and accompanying text.

18. *See infra* notes 225-34 and accompanying text.

19. NOW WITH BILL MOYERS, *Science and Health: Medicaid Overview*, available at <http://www.pbs.org/now/science/medicaid.html> (last visited May 7, 2005).

20. National Center for Chronic Disease Prevention, *At A Glance: Healthy Aging, 2004*, (quoting William D. Novelli, Ex. Dir., CEO of AARP), available at http://www.cdc.gov/nccdphp/aag/aag_aging.htm (last visited May 7, 2005).

cans were aged 65 or older; in 2030, an estimated twenty percent of Americans will be over the age of 65, and adults 85 or older will make up the fastest-growing segment of that age bracket.²¹ This shift will increase the pressure on American systems of caring for the aging in several obvious ways. First, the ratio of working adults to retired adults will drop from a five-to-one ratio today down to a two-to-one ratio over the next fifty years.²² An average of two wage-earners will be paying into Social Security for each retiree receiving benefits, compared to a fifteen-to-one ratio in 1950 and a four-to-one ratio today.²³ This growth in the number of Americans eligible for government benefits such as Medicare, Medicaid, and Social Security will squeeze the system on the demand side even while the decline in relative numbers of wage earners contributing to those benefit programs will tighten resource availability on the supply side as well.

In addition to this distribution shift, the actual cost of health care for older Americans is increasing faster than general growth in the economy and also faster than the costs for younger Americans. In 2000, health care spending for those 65 and older was more than eight times higher than it was in 1963.²⁴ The costs for those under 65 was, by contrast, increased only 4.6 times over what it was in 1963. One estimate calculates that by 2020, half of all health-care dollars will be spent on the elderly. Medicare spending alone, which covers only about 55 percent of the health care costs of Americans over 65, grew from 0.75 percent of the Gross Domestic Product in 1970 to 2.6 percent in 2003 and is predicted to consume more than 5 percent of GDP by 2020.²⁵ Added to that is the increase in life expectancy, which both lengthens the span of time during which an older American will require health care and increases actual costs per year of that care.²⁶ The cost of *just* nursing home care during *just* the last two years of life is about five times higher for persons dying at age 90 compared to

21. Paola Scommegna, Population Reference Bureau, *U.S. Growing Bigger, Older, and More Diverse* (April 2004), available at <http://www.prb.org/Template.cfm?Section=PRB&template=/ContentManagement/ContentDisplay.cfm&ContentID=10201> (last visited May 7, 2005).

22. U.S. Interim Projections by Age, Sex, Race, and Hispanic Origin, U.S. Census Bureau (March 2004), available at <http://www.census.gov/ipc/www/usinterimproj/> (last visited May 7, 2005).

23. Ratio of Social Security Covered Workers to Beneficiaries 1940-2000, Social Security Online, available at <http://www.ssa.gov/history/ratios.html> (last visited May 7, 2005).

24. James Lubitz, *Getting Older, Staying Healthier: The Demographics of Health Care*, Testimony before the Joint Economic Committee, U.S. Senate, July 22, 2004, available at <http://www.cdc.gov/washington/testimony/Ag7222004203.htm> (last visited April 22, 2005). Figures cited are per capita and are adjusted for inflation.

25. *Id.*

26. *Id.*

persons dying at 70.²⁷ Nursing home and other long-term care costs are especially likely to increase dramatically the older a patient is. For those age 90 or older, the average costs of nursing home care in the final two years of life are higher than the average Medicare (i.e., non-long-term care) expenses in the final two years for all covered services combined.²⁸

The increasing cost of health care is not just a problem for retirees. Spending on health care by all age groups has grown at a rate of four percent or more *annually* for the past fifty years.²⁹ Healthcare costs nationwide for all age groups consumed approximately 14 percent of the GDP in 1998 compared to 5 percent in 1960.³⁰ The amount that Americans must pay out of pocket each year (actual health care costs plus increased insurance premium contributions) as a percentage of the total rises each year.³¹ In 2002, the average annual per capita expenditure for health care for all Americans (of all ages and all health conditions) was \$5,440.³² As health care takes a bigger and bigger bite out of the economy each year, there are fewer and fewer dollars for Americans to devote to savings or long-term care insurance or anything else. It would appear that this situation will only worsen over the coming decades.

This does not mean that Americans (or their health care providers) will therefore choose not to seek medical care or will select their treatments with an eye to keeping within a budget.³³ Nor is there much reason to think that budget-minded choices would be feasible even if individuals wanted to make them. Even today, the pressures pushing up medical costs are immense, not only from increased patient expectations but also from just the sheer availability of improved and more expensive options coupled with the culture of health care providers:

The other factors influencing behavior include the technological imperative that infuses the entire enterprise of modern medicine with a powerful bias in favor of maximizing the aggressive use of advanced technological interventions whenever possible; an educational and socialization process that instills new health care professionals with an ethos that

27. *Id.*

28. *Id.*

29. Joseph P. Newhouse, *Medical Care Costs: How Much Welfare Loss*, 6 J. ECONOMIC PERSPECTIVES 3 (1993).

30. Kaiser Family Foundation, *Trends and Indicators in the Changing Health Care Marketplace*, Ex. 1:1, available at <http://www.kff.org/insurance/7031> (last visited April 25, 2005).

31. *Id.* at Ex. 1.8.

32. *Id.* at Ex. 1.1.

33. Newhouse, *supra* note 29, at 15-16.

death is the ultimate failure, to be avoided as long as possible by any means available; multimedia coverage that actively feeds public expectations of both medical miracles on the imminent verge of discovery and fears of medical sadists running amok inciting unwanted and inappropriate overtreatment at the end of life; anxieties about adverse legal repercussions, both for overtreatment (e.g., providing too much pain relief) and undertreatment; ageist prejudices and stereotypes; and even the patient's geographical location.³⁴

That "aggressive use" of advanced technology, in turn, expands in proportion to the increase of available interventions. In fact, as much as 75% of the increase in real-dollar health care costs in the United States over the past 50 years has been attributed *solely* to technological advances.³⁵ And those advances have appeared at a rapid pace, with most of the significant inventions in medical care technology debuting in the latter third of the previous century.³⁶ We have welcomed these advances, and understandably so, for they have extended our lives.³⁷ Efforts at "cost containment," including HMOs, have not been able to show any significant reduction in the use of new technologies, thus supporting the idea that there is no market for "1960s medicine at 1960s prices," regardless of the hardship caused by rising costs.³⁸

Medicaid is already groaning under the strain. In Texas, for example, expansion of the Medicaid program in the 1990s increased the number of participants by more than a third, from 2.5 million to approximately 3.5 million.³⁹ In 2003, almost two-thirds of the states were approaching the limit of allocated Medicaid funds only halfway through the fiscal year and had to initiate deep cuts in benefits.⁴⁰ Medicaid spending per elderly enrollee nationwide reached \$12,800 in 2003.⁴¹ States are already depleting such one-time sources as tobacco

34. Marshall B. Kapp, *Economic Influences on End-of-Life Care: Empirical Evidence and Ethical Speculation*, 25 DEATH STUDIES 251, 253 (2001) (internal citations omitted).

35. Newhouse, *supra* note 29. This was confirmed by Albert A. Okunade and Vasudeva N.R. Murthy, *Technology As A 'Major Driver' Of Health Care Costs: A Cointegration Analysis Of The Newhouse Conjecture*, 21 J. HEALTH ECONOMICS 147 (January 2002).

36. See generally Okunade and Murthy, *supra* note 35.

37. See generally National Center for Health Statistics, VITAL STATISTICS OF THE UNITED STATES, available at <http://www.cdc.gov/nchs/nvss.htm> (last visited May 7, 2005).

38. Newhouse, *supra* note 29, at 16.

39. Texas Health & Human Services Comm., *Medicaid History*, available at http://www.hhsc.state.tx.us/Medicaid/Med_info/medhist.html (last visited May 7, 2005).

40. Kaiser Family Foundation, *State Fiscal Conditions and Medicaid* (April 2004), available at <http://www.kff.org/medicaid/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=34498> (last visited May 7, 2005) (internal references omitted).

41. Kaiser Family Foundation, *supra* note 30, at Ex. 1.15.

settlements and prior year surpluses to try to keep Medicaid afloat.⁴² Every state legislature in the Union is bent over their collective budgeting desks, trying, apparently in vain, to find more ways to contain costs:

In a survey of state officials in all 50 states and the District of Columbia in December 2003, the Kaiser Commission on Medicaid and the Uninsured found that 49 states and DC have implemented or planned Medicaid cost containment strategies for FY 2004. In FY 2004, 43 states reported implementing pharmacy cost controls, and 39 states reported freezing provider rates or reducing rate increases for at least one group of providers. In addition, 21 states imposed new or higher co-payments; 18 states reported implementing eligibility restrictions; and 17 states restricted or reduced the availability of benefits. For many states, FY 2004 was the third consecutive year of Medicaid cost containment activity.⁴³

In short, we are living longer, surviving more health crises, spending more on health care throughout our lives, and ending up with less and less available to meet our still increasing needs in our (now expanded) older years. Whereas a person in the 1950s might have been able to afford most of the limited treatments available (either personally or through insurance) throughout most of the years they could expect to live, today's advanced therapies are simply too expensive. More than a few catastrophic illnesses, or more than a few years in long-term care, will completely consume the entire life savings of most Americans, period.

The typical scenario is this: an aging person (or couple) realizes that, sooner or later (usually sooner), one or both of them will need long-term nursing care, most likely in an institution. Cost of such care is high, ranging from \$99 per day in Louisiana to \$448 per day in Alaska, with a national average of \$150 per day.⁴⁴ Quick calculations reveal that a year of care will total, on average, somewhere in the range of \$54,000 per year. The average net wealth of American households headed by those age 65 or older was \$196,300 in 2001; but the median was only \$40,500.⁴⁵ Excluding the value of the family home,

42. Kaiser Family Foundation, *supra* note 40.

43. *Id.*

44. American Association for Retired Persons, *Average Daily Cost for Nursing Home Care by State* (2001), available at <http://www.aarp.org/bulletin/longterm/Articles/a2003-10-30-dailycost.html> (last visited May 7, 2005).

45. Elena Grouska and Frank Stafford, *Trends in Household Wealth Dynamics 1999-2001*, available at <http://psidonline.isr.umich.edu/Publications/Papers/TrendsInDynamics1999-2001.pdf> (last visited May 7, 2005). While "wealth" can be and is defined in myriad ways; here it refers to the sum of wealth in generally liquid assets, such as stocks, mutual funds, investment trusts, IRAs, checking accounts, savings accounts, money market funds, CDs, government saving bonds, Treasury bills, corporate and mu-

seventy-five percent of American families have a net worth of only \$129,000 or less.⁴⁶ Including the value of the home, the net worth of that seventy-five percent rises to \$227,000 or less.⁴⁷ It is easy to see how frightening the costs of long-term care look to an average middle-class family trying to plan for the future. Most American families can afford, at best, only about four years of nursing-home care before they will find themselves completely destitute. This portrait of American families straining under the costs of long-term health-care for the aging is now the norm, not the exception. Most Americans do not have many resources to turn to in the face of these dangers. Medicare helps pay medical costs, to be sure, but most health insurance, including Medicare, will not help with the cost of long-term care facilities such as nursing homes, even when it is a medical problem that creates the need for that care. The most significant single source of assistance with such costs is the Medicaid program.⁴⁸

II. A BRIEF HISTORY OF MEDICAID AND MEDICAID PLANNING

Despite the heavy dependence on it, Medicaid is not readily available to most Americans. Medicaid was established in the 1960s to help the very poor obtain health care they otherwise would not receive.⁴⁹ Benefits were limited to health care services for low-income children deprived of parental support, their caretaker relatives, the elderly, the blind, and individuals with disabilities.⁵⁰ Over the decades, the ambit of Medicaid has grown and changed to include more and more participants.⁵¹ At present there are approximately 48 million people receiving Medicaid benefits.⁵² Still, the goal and purpose has remained the same: to provide access to health care to those too poor to access it otherwise. Even today, the income limits for qualification are set very low.⁵³ The program also imposes limits on re-

municipal bonds, and cash value of life insurance policies. The calculation does not include pension assets (i.e., the present value of private defined contribution and defined benefit plans). It also excludes rights to Social Security payments. *Id.*

46. *Id.*

47. *Id.*

48. Centers for Medicare & Medicaid Services, PROGRAM INFORMATION (June 2002) at 19, available at www.cms.hhs.gov/charts/series/sec1.ppt (last visited May 7, 2005).

49. *Id.*

50. *Id.*

51. *Id.*

52. Ralph J. Moore & Ron M. Landsman, *Planning for Disability*, 816 TAX MGMT. (BNA) (2000).

53. Exact requirements vary by state. *See, e.g.*, Aged & Disabled Medicaid (Neb.), available at <http://www.hhs.state.ne.us/ags/agsmed.htm> (last visited May 7, 2005); Medicaid Eligibility (N.C.), available at <http://www.dhhs.state.nc.us/dma/basicmedelig.pdf> (last visited May 7, 2005).

sources. Under these rules, an applicant will be denied benefits so long as he or she has resources of more than \$2,000. The allowed resource amount for couples is \$3,000.⁵⁴

As the national health care picture changed, however, and as long-term residential care for the elderly became the norm rather than the exception, a new kind of Medicaid applicant appeared. This applicant, never poor before, had assets and/or income that placed them above the limits for receiving assistance, and yet faced an anticipated total cost of needed medical care that would clearly outstrip all available resources. This is the “medically needy” category of applicant. The “medically needy” category is available only to older Americans, and was created for exactly the long-term care problems that they face.⁵⁵ With regards to income, Medicaid created ways of counting and spending income that would enable someone to qualify for Medicaid assistance even though their income (usually Social Security and perhaps pension payments) was too high for them to qualify otherwise.⁵⁶ These income rules, although requiring careful record-keeping and familiarity with the program, are not the primary problem for many of those who hope to receive benefits—rather, it is the resource rules that prove the sticking point, not because they are complicated, although they may seem so when reviewed in detail, but because of the perceived harshness of the requirements, which require a potential beneficiary to spend virtually all they have before they can qualify for assistance.⁵⁷ This is not a surprising or outrageous requirement, as Medicaid was created to help the poorest Americans; those who can afford even some of their own medical care must use their own resources to do so, like it or not. But it is a difficult pill to swallow nonetheless, perhaps especially because the result it demands is precisely the nightmare that motivated these Americans to work so hard, in the hopes it could be avoided: the end of life will find you in total poverty, with nothing of your life’s labors remaining and nothing of economic value to leave your family, not even your spouse.

This fact knocks the breath out of most Americans, who carried such different expectations for so many years. First, it threatens the security of the potential Medicaid beneficiary and his family by impoverishing the spouse as well.⁵⁸ In 1988, new rules were established in hopes of preventing that result, but these rules—popularly (and per-

54. Again, these vary by state, *id.*, with some states allowing individuals or couples to keep slightly more, and with states applying different rules regarding life insurance, burial plots, et c. The numbers stated here are the lowest caps allowed by federal law.

55. Moore & Landsman, *supra* note 52, at 42, 63.

56. *Id.* at 63-64.

57. *Id.* at 67.

58. See *infra* notes 114-38 and accompanying text.

haps aptly, albeit ironically) called the Spousal Impoverishment Rules—but they succeed only in softening it slightly, indeed if at all.⁵⁹ The non-beneficiary spouse no longer must become poor enough to qualify for Medicaid personally (unless they also require assistance, of course), but the rules do not accomplish anything as ambitious as preservation of the non-beneficiary's wealth.⁶⁰ Moreover, although these rules require the near-poverty of the non-beneficiary spouse (called the Community Spouse) only at the time benefits are being paid for the institutionalized spouse, the Medicaid administration policy of estate recovery continues to pursue assets long after the beneficiary's death.⁶¹ All in all, the Medicaid qualification rules decimate one of the central ideas motivating wealth accumulation in America—the idea that one should leave an inheritance to one's children. Sixty-seven percent of women aged 58 and older agree that it is important to leave such an inheritance.⁶² More than half of all Americans age 54 and older believe that, if there is wealth, it is the children's *right* to receive an inheritance.⁶³

Small wonder, then, that Congress and state legislatures and judges are taking such stern measures to restrict the use of public benefit programs. And small wonder also that so many Americans are looking for ways to access those programs anyway. The average aging American is caught between two realities: She wants to leave a little something for her children—indeed, she feels duty-bound to do so—but she knows that her own long-term care will wipe out whatever she has managed to accumulate throughout her life. At her age, she cannot do much to increase what she has; the only other option is to try to shield some of her hard-earned assets from the “velociraptor” of medical costs. Against the likely total costs of her long-term care, her collected assets do not amount to more than the proverbial drop in the bucket; but in the context of her children's lives, her assets have real potential to do good, to make their lives a little easier than her own. In this context, many Medicaid applicants simply do not see any real evil in trying to circumvent Medicaid's forced impoverishment. “The clients [of elder law lawyers and estate planners] feel like they're in a lose-lose corner already,” said one planner.⁶⁴ And indeed, so long as

59. Moore & Landsman, *supra* note 52, at 65-70.

60. See generally Omar Ahmed, *Medicaid Eligibility Rules for the Elderly Long-Term Care Applicant*, 20 J. LEGAL MED. 251, 254 (1999).

61. See *infra* notes 114-38 and accompanying text.

62. Charles Schwab & Co., *Current Estate Planning Behaviors May Impede Future Inheritance Windfall*, available at www.morethanmoney.org/schwab1.pdf (last visited May 7, 2005).

63. *Id.*

64. John O'Connor, *State: Elder Lawyers Getting Too Good at Their Jobs*, THE DAILY RECORD (Maryland), Aug. 15, 2003.

there remain legal methods to avoid the harsh outcome Medicaid requires, there is no doubt that those methods will be used, despite complaints that this is tantamount to “legal fraud.”⁶⁵ “Medicaid planning” is the name given to the deliberate use of these methods to soften the impact of the resource rules.⁶⁶

As noted, persons who have available resources in excess of \$2,000 are ineligible for Medicaid assistance. Those who do have such resources must consume them.⁶⁷ But that seemingly simple requirement is not always easy to satisfy. Medicaid’s idea of what constitutes an “available resource” does not always comport with ordinary understandings of either “available” or “resource, because some “available resources” may not be held as cash or easily converted to cash. This is because Medicaid rules are premised on a “rights-based” theory of “property.” Like the Internal Revenue Code, Medicaid rules tacitly depend upon a definition of “property” in terms of one’s *rights* to an asset—usually the rights to possess it, to control it, or to give it away. Specifically, these rights must be *legally enforceable*; that is, one’s “right” to the asset must be of a nature that the right-holder may sue for the value of the asset if anyone abrogates or denies that right. These rights can be counted, valued and used, in the case of Medicaid, as a basis to limit the right-holder’s access to benefits, regardless of the right-holder’s *actual* control or possession of the property.⁶⁸ Most of the “resources” that Medicaid considers “available” can be grouped into two relatively simple categories: those which the applicant actually does own (“owned assets”), which gives the applicant numerous legally enforceable rights over the asset,⁶⁹ and those the applicant does not own but over which the applicant has some other category of legally enforceable right, usually the right to demand transfer of the asset as one wishes (“enforceable claims”). Examples of such “enforceable claims” include unpaid child support, damages from personal injury settlements or awards, or any debt upon which judgment has been entered.⁷⁰ Assets subject to “enforceable claims” are generally counted as “available” regardless of the applicant’s actual success or

65. See Eldon L. Wegner and Sarah W. Yuan, *Legal Welfare Fraud Among Middle-Class Families*, 47:11 AMERICAN BEHAVIORAL SCIENTIST 1406 (2004).

66. *Id.* See also *infra* notes 76-118 and accompanying text.

67. Giving the assets away does not work; see *infra* notes 76-118 and accompanying text.

68. Moore & Landsman, *supra* note 52, at 36-38, 64-65, 85-86; see also 42 U.S.C. 1396p(e)(1) (2000).

69. Rights of ownership usually are understood to include, among others, the rights to possess the asset, to control its use, to enjoy its natural products, to exclude others from exercise of these rights, and to demand payment of damages from those who interfere with any of these rights. Moore & Landsman, *supra* note 52, at 36-38.

70. Moore & Landsman, *supra* note 52, at 79-83.

even effort to enforce the claim.⁷¹ The other key concept required for resource analysis is the "applicable look-back period." The look-back period, the length of which has changed over the years and varies depending on the kind of asset that was transferred, provides a deterrent to last-minute attempts to qualify for benefits by deeming transferred assets "available" if the transfer occurred within a few years of the application.⁷² The look-back period penalizes such transfers on grounds similar to those used to "unwind" fraudulent transfers by a debtor.⁷³ Presumably, the need for Medicaid assistance was reasonably foreseeable for a certain amount of time before the actual application; because the applicant "voluntarily impoverished" himself during this period, despite the fact that he "knew or should have known" of the upcoming need, the transaction and its effects on the applicant's resource total will be ignored.⁷⁴

The simplest and earliest version of "Medicaid planning" focused on the obvious strategy of transferring one's assets (or legally enforceable claims) to someone else so that the applicant no longer owned them.⁷⁵ Before 1972, this actually worked. Many who anticipate needing long-term care still want to do the obvious and give away as many assets as they can, usually to the same "objects of their bounty" named under their will.⁷⁶ This does remove the assets from the applicant's legal ownership, but depending on the timing, the applicable look-back period may operate to make the assets countable as "available resources" anyway.⁷⁷ Such gifts will not be undone—the applicant will not get the assets back—but this counting rule will result in a period of ineligibility equal to the amount of time those assets (or their deemed value) would have paid for the applicant's care.⁷⁸ The applicant is then left with no assets and no Medicaid benefits for that period of ineligibility. This limits the effectiveness of this strategy when the need for Medicaid is imminent, and consequently, it is hoped, reduces the motivation for such transfers as well.⁷⁹ It also provides *positive* motivation to pursue any assets that might be subject to legally enforceable claims, because their value will be counted as "avail-

71. *Id.* at 80-83. In theory, such "assets," should have a value of zero if they cannot be liquidated within a reasonable time, but in many cases this idea seems to be ignored. *Id.* at 36.

72. Moore & Landsman, *supra* note 52, at 80-83.

73. *Id.* at 78-79.

74. *Id.* at 82.

75. *Id.* at 78-79.

76. *Id.*

77. *Id.*

78. *Id.* at 78-84.

79. *Id.* at 79. Alternatively, it requires the beneficiaries of the applicant's unfortunate largesse to pony up and help with the bills. Either solution is compatible with Medicaid policy, as is shown further by the practice of pursuing estate recovery.

able" whether the applicant ever actually collects them or not. These ineligibility periods do not, however, act as an absolute bar on these techniques. Outright gifts may be made, for example, of approximately half the applicant's accumulated wealth, and although the value of these gifts will result in a period of ineligibility, the value of the other half of the applicant's estate should be sufficient to provide for the applicant's care until the ineligibility period expires.⁸⁰

A more sophisticated strategy for Medicaid planning has involved the use of trusts. Assets held in trust are not "owned" by the applicant even if the applicant established the trust with her own funds (i.e., "owned assets"), because the applicant transfers legal title to those assets (and thus "ownership" of them) to the trustee.⁸¹ If the trust agreement is irrevocable, then the transfer is likewise irrevocable, leaving the settlor, *qua* settlor, bereft not only of title but also of any legally enforceable claim to the assets. If the settlor is also a beneficiary of the trust, that status can give her a legally enforceable claim, but only if the terms of the trust agreement requires distributions to her or for her benefit.⁸² If the trustee has sufficiently broad discretion regarding distributions, then the beneficiaries of the trust have no legal authority to demand the assets.⁸³ This is true even if the trust is "self-settled" (i.e., the settlor is also a beneficiary), provided, as with "ownership," that the trust is irrevocable.⁸⁴ Because Medicaid originally was allowed to count only those assets that were either "owned" or subject to an "enforceable claim," assets transferred into such a trust, called a "discretionary trust," could not be counted as "available resources," even though distributions might be made to or for the

80. Moore & Landsman, *supra* note 52, at 84-85. This gifting strategy works only because the period of ineligibility is calculated from the date of the transfer rather than the date the application is made. *Id.* Thus, in a region where the average cost of long-term care is \$100 per day, an applicant with \$10,000 cash can make a gift of \$5,000 on March 1 and wait to apply for Medicaid until April 21. Because the cash was transferred during the applicable look-back period, a period of ineligibility will be imposed. The length of the ineligibility period will be the number of days the transfer could have paid for long-term care in that region, calculated by dividing the value of the gift, or \$5,000, by the per day care cost of \$100. The resulting ineligibility period of 50 days will be counted from the day of the transfer and will expire on April 20. This strategy works only because the ineligibility begins on the day the gift is made, allowing the period to run concurrently with the spend-down of the assets retained after the gift. *Id.* at 79, n.747.

81. Moore & Landsman, *supra* note 52, at 36-37.

82. *Id.* at 70 (1).

83. *Id.* Generally, such a trustee will not be liable for denying distributions unless the beneficiary can prove abuse of discretion, gross negligence, fraud, or some other breach of fiduciary duty.

84. Of course, if the settlor/beneficiary has a right to revoke and thereby terminate the trust, the specific powers of the trustee to make or withhold distributions is irrelevant, because the settlor/beneficiary who dislikes the trustee's decisions can simply revoke the trust and thereby regain legal ownership of all its assets.

Medicaid recipient and even though the trust assets would pass undiminished to the Medicaid recipient's chosen beneficiaries. The use of discretionary trusts for estate planning predates Medicaid, of course, and such trusts are employed for many reasons unrelated to Medicaid,⁸⁵ but their popularity for Medicaid planning gave rise to the popular name of Medicaid Qualifying Trusts, or "MQTs."⁸⁶ Congress found this easy method of shielding assets deeply troubling, especially in the case of "self-settled" trusts.⁸⁷ But despite its apparent unfairness, this result makes sense and is arguably unavoidable under the "rights"-based understanding of "property." If you do not own it and cannot demand it, then the asset in question really *is not* "available" under a rights-based theory, because that theory requires that to be considered "your property," an asset must be susceptible to a *legal* demand, that is, one that a court of law can and will enforce with all the available power of the state.⁸⁸ As noted, this understanding of property ignores the practical problems of actually getting hold of the assets, such as whether the party subject to a court's order has any ability to pay or even whether the party who has the enforceable claim can afford the legal process required to collect. Consequently, this rights-based understanding of property also must ignore the apparent *availability* of assets unless they are subject to such claim enforceable *at law*.⁸⁹ That the assets in a discretionary trust might benefit the Medicaid applicant's children therefore must be irrelevant under this theory because *at law* there is no legally enforceable duty for them to do so.⁹⁰ This "loophole" allowed use of such discretionary trusts to grow quickly. The Medicaid program's reliance on a rights-based theory of property provided too few tools with which to stop the abuse.⁹¹ Unless the trust was established within the applicable look-back period, the Medicaid applicant and his assets were home free.

In 1986, the rules for self-settled discretionary trusts were revised to reverse the centuries-old understanding of "discretion." Under the new rules, the principal and income of a "Medicaid qualifying trust" were considered "available resources" to whatever extent the trust terms permitted the trustee to distribute them for the benefit of the

85. A common type of discretionary trust is the "spendthrift trust," which shields the trust assets from the creditors of the beneficiary or beneficiaries. A critical difference is that in most states, a spendthrift trust cannot be self-settled. Moore & Landsman, *supra* note 52, at 47.

86. Moore & Landsman, *supra* note 52, at 70-71.

87. *Id.*

88. See *supra* notes 68-72 and accompanying text.

89. Moore & Landsman, *supra* note 52, at 70(1)-71.

90. *Id.*

91. *Id.*

Medicaid applicant.⁹² Once labeled a MQT, every penny that could even theoretically be distributed to or for the benefit of the applicant would now be deemed “available” regardless of whether the trustee ever actually made such a distribution.⁹³ In putting such rules in place, Congress took a bold step beyond the traditional understanding of property as *legal rights*. It no longer mattered that the settlor of the trust had no legally enforceable claim with which to demand distributions; a settlor who established the terms of distribution in the first place would not be able to escape Medicaid’s counting rules just because he volunteered to surrender his legal rights.⁹⁴ The new rules also held no concern for the rights that other beneficiaries might have to the same assets, nor did they consider the trustee’s fiduciary duty to balance the interests of all beneficiaries.⁹⁵ It is not clear what theory, if any, inspired Congress to take such a step, but the change certainly is defensible under a theory that such transfers are “fraudulent.”⁹⁶ Fraudulent transfer theory is as old as almost any theory in Anglo-American property law and is still in use today, with good reason, for it allows a court of law to overlook the fact that the assets have escaped the reach of the transferor *if* the motive for the transfer was to defeat those *same* rights in the hands of a third party.⁹⁷ The theory of “fraudulent transfer” is used as a conduit through which an innocent party, such as a creditor, may enforce the very rights that are put in question by the transfer at issue. Put another way, the transferor’s use of “rights-based” property theory to defeat creditor claims undermines the logical foundation of the “rights-based” theory itself—and therefore of the transferor’s argument as well. Such a logical conundrum renders traditional rights-based analysis inoperable and thereby both allows *and compels* the court to set such analysis aside. But the transferor’s intent is key; without that intent, the justification for jumping outside the usual analytical framework would disappear.⁹⁸ In the case of self-settled trusts after 1986, especially when evidence indicated the trust was established *for the purpose* of qualifying for Medicaid benefits, fraudulent transfer theory would have offered a reasonable method for discouraging and

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. To see how this argument works, see generally Dean David Gamin, *Renunciation of Testamentary Benefit as a Fraudulent Transfer*, 37 CASE W. RES. L. REV. 148 (1986).

97. See Moore & Landsman, *supra* note 52, at 78.

98. There are contemporary applications of fraudulent transfer law that dispense with the need to prove intent. Whether such evolutions make any legal or logical sense is another question.

punishing "bad" conduct. The use of self-settled discretionary trusts did not stop, however, and the assets of Medicaid beneficiaries continued to enjoy protection from the bottomless appetite of long-term care. Avoiding inclusion of the trust assets required more care on the part of the planner, but generally speaking, any of popular variations of the MQT, if drafted correctly, still had the power to ensure the settlor's assets would be distributed as she chose even while she qualified for Medicaid assistance.⁹⁹

In 1993, Congress finally lost its patience and, as part of the Omnibus Budget Reconciliation Act ("BRA"), tightened the rules regarding self-settled trusts to the point of a strangle-hold. The new rules tossed aside the previous concern over trustee powers, repealed those sections that had dealt with "Medicaid qualifying trusts," and focused instead on a full-bore assault on any trust deemed to be "self-settled."¹⁰⁰ Under the new rules, all the assets of any "self-settled" trust¹⁰¹ (or that portion of such a trust funded with the settlor's own assets if two or more persons acted as settlor) would be considered "available" without regard to the purpose of the trust; whether the trust was revocable or irrevocable; whether trustees have or use any discretion to make distributions; any restrictions on whether and when to make distributions; any restrictions on use of distributions; or whether distributions to or for the benefit of the settlor are or were ever, in fact, made.¹⁰²

Assets of a self-settled trust are "available resources," and distributions from the trust are countable again under the income rules, doubling the trouble if distributions are actually made to the settlor.¹⁰³ Assets that are categorically unavailable to the settlor (e.g., the trust income if the settlor is not an income beneficiary) will not be counted as "available," but their transfer to the trust will be deemed a gratuitous transfer and may create a period of ineligibility if the transfer occurred within the applicable look-back period.¹⁰⁴ The look-back period for certain transfers to trusts ballooned to 60 months, in contrast to a 36-month period for outright gifts.¹⁰⁵ Moreover, additions to a self-settled trust start new periods of ineligibility, which run

99. Certainly, not every settlor of these trusts had set out to "game the system;" such trusts were often established quite "innocently," as part of an independent estate plan created years ago for reasons having nothing to do with Medicaid. Congress disliked the results nonetheless. Moore & Landsman, *supra* note 52, at 71.

100. Moore & Landsman, *supra* note 52, at 71-73.

101. Other than certain trusts for the disabled, which were narrowly defined under a very limited exception. Moore & Landsman, *supra* note 52, at 73-78.

102. 42 U.S.C. § 1396p (d)(2)(c).

103. 42 U.S.C. § 1396p (d)(3)(A)(i).

104. 42 U.S.C. § 1396p (d)(3)(B)(i).

105. Moore & Landsman, *supra* note 52, at 79.

from the date of the addition rather than the date that the trust was established.¹⁰⁶

But the real key to the vast sweep of the new rules lies in the broadened definitions of “trust” and “self-settled.” “Trust” now includes not only those agreements ordinarily meant by the term but also “any legal instrument or device that is similar to a trust.” “Self-settled,” meanwhile, was expanded to encompass not only those trusts established by the applicant, but also those established by the applicant’s spouse or by any person, court, or administrative body acting in place of or on behalf of the applicant or the applicant’s spouse.¹⁰⁷ A person is deemed to have “established” a trust whenever their assets—whether owned outright or subject to an enforceable claim—are used to fund all or part of such a trust.¹⁰⁸ The only remaining exception (other than certain trusts for the disabled) is one for testamentary trusts.¹⁰⁹

Even though Congress expanded the definition of “self-settled” to scarf up certain trusts not established by the Medicaid applicant, the aim clearly was to gut the usefulness of the MQT. Perhaps remarkably, the counting of assets held in trusts established by others did not change (unless that third party was one who would be deemed to be your “self” under the rule described above).¹¹⁰ As has been true for many years, the evaluation of assets held in such “third party” trusts varies depending on the jurisdiction. Such assets are typically analyzed in one of three ways:

1. The settlor’s intent in establishing the trust may be given greater weight than the government’s interest in counting the trust assets. In these cases, analysis focuses on the language of the trust agreement. Such assets may be deemed “available” or not, depending on the particular language used, especially regarding the trustee’s discretion.
2. The government’s interest is considered superior to any interest of the settlor. Assets of such a trust will generally be considered “available” if any theory will support doing so, regardless of the settlor’s intent.
3. The court (or administrative body) may attempt to balance the competing interests of settlor and state.¹¹¹

There are still ways to plan the transfer of one’s assets so as to soften the impact of Medicaid resource counting rules, and there are

106. *Id.* at 72.

107. 42 U.S.C. § 1396p (d)(2)(C).

108. *Id.*

109. *Id.*

110. Moore & Landsman, *supra* note 52, at 64.

111. *Id.* at 47-48.

still ways to shield some wealth for one's chosen beneficiaries.¹¹² The 1993 OBRA rules, however, have crippled self-settled discretionary trusts for Medicaid planning purposes, and indeed the reliability of other trust-based planning strategies is far from certain over the long term.¹¹³ Furthermore, the use of self-settled discretionary trusts even for entirely benign estate planning purposes must be pursued with some caution, keeping one eye open for the possibility of inadvertent but devastating Medicaid consequences, whether for the settlor or their beneficiaries.

III. ELECTIVE SHARES AND ESTATE RECOVERY

Meanwhile, the Medicaid treatment of assets held by spouses has been evolving, too. In 1972, the Supplemental Security Income program ("SSI") was established, and all those enrolled in SSI were automatically made eligible for Medicaid as well.¹¹⁴ In part because of this increase in the number of beneficiaries, Medicaid began treating all assets of an applicant's spouse as if those assets were fully available to the applicant.¹¹⁵ This had a catastrophic effect on the non-beneficiary spouse (called the "community spouse" under Medicaid rules), often leaving them not only bereft emotionally but also financially ruined when their spouse became institutionalized.¹¹⁶ In 1988, the Medicaid Catastrophic Coverage Act ("MCCA") attempted to mitigate this problem by reworking the counting rules for married applicants. Instead of viewing all assets of both spouses as fully available to the applicant, formulas were developed to permit the non-beneficiary spouse to exempt a "sufficient but not excessive" amount for their own support.¹¹⁷ The exemption provisions, rather ironically (but perhaps accurately) referred to as the Spousal Impoverishment Rules, did ameliorate the draconian provisions in place earlier, but they certainly did not permit the non-beneficiary spouse to retain many assets, either for themselves or for their own heirs or beneficiaries.

What Medicaid administrators gave with the right hand, however, they began taking back with the left. In a one-two punch aimed at non-beneficiary spouses, Medicaid began to apply "enforceable claim" analysis to a widowed spouse's elective share, counting the assets that the surviving spouse could demand as "available re-

112. *Id.* at 76-78.

113. *Id.* at 78.

114. *Id.* at 35.

115. *Id.* at 65, 66.

116. *Id.* at 65 and 70 n.256.2.

117. *See* Ahmed, *supra* note 60, at 253.

sources.”¹¹⁸ This policy effectively forces surviving spouses to undo their deceased spouse’s estate plan to the extent it provides them with “less” than the elective share, especially if those plans direct the deceased spouse’s estate into a trust. Of course, “less” as measured by Medicaid counting rules, may well be preferred by a surviving spouse receiving Medicaid assistance, but “less” according to the counting rules might be *more* advantageous although “less” in terms of outright ownership. That is, the same dollars transferred outright in satisfaction of the election share, on the one hand, or transferred into a trust, on the other, are not the same as far as the counting rules are concerned, because outright ownership is generally seen as more valuable than a beneficial interest in a trust.¹¹⁹ Moreover, should the spouse fail to exercise the elective share and thereby (even inadvertently) cause those dollars to go into a trust as planned, the counting rules will almost certainly deem that portion of the trust “self-settled” and subject to the harshest of the counting rules. The elective share was formerly known in many jurisdictions as the “forced” share because the spouse could force that share out of the estate in contravention of the decedent’s wishes; under this policy, the share is “forced” in a new sense entirely.

Parallel to this assault on the estate plans of non-beneficiary spouses, a similar attack was essayed against the estates themselves, not only the estates of deceased beneficiaries but also the estates of non-beneficiary spouses. Congress mandated that states file claims against these estates for the amount of benefits paid, despite the clear statement in Medicaid regulations that benefits properly paid cannot be demanded back. This policy dilutes any benefit gained from the softening of spousal attribution rules, which now appears to accomplish nothing more than a deferral of Medicaid consequences. A husband or wife could devote the bulk of their life’s savings to their spouse’s long-term care, properly follow all the rules requiring the counting and spending of their own assets, endure those limited circumstances until their spouse’s death, and then, after possibly rebuilding that nest egg in the years that follow, have their savings plundered yet again once they themselves have passed on.¹²⁰ These policies present uniquely troubling throwbacks to the earlier practice of impoverishing both spouses before paying benefits to one. The modification of those older rules under the MCCA seems to have created no systemic concern for the property rights of the non-beneficiary

118. Marvin Rachlin, *Conflicts Between Federal and State Law Involving the Spousal Right of Election*, 75 N.Y. St. B.J. 52 (Jun. 2003).

119. And not only for Medicaid purposes!

120. See Moore & Landsman, *supra* note 52, at 86.

spouse, whose estate plan will be overturned should they happen to die first and whose estate will be charged later if they happen to survive. Both the elective share policy and the estate recovery mandate seem to violate the non-beneficiary spouse's rights of testation.¹²¹ They are, at the least, arguably inconsistent with the sentiment that motivated the effort to prevent spousal impoverishment.

This problem shows up again in the world of trusts, but is further exacerbated by the 1993 OBRA rules. One sort of trust, very familiar to most planners, deserves special attention. This is the Qualified Terminal Interest Property trust, or "QTIP" trust for short.¹²² In a QTIP trust, the surviving spouse is left a mandatory lifetime interest in the income of the trust.¹²³ This income, of course, will be measured against the Medicaid income caps when determining the beneficiary's eligibility.¹²⁴ Because the QTIP trustee is often prohibited and never required to make distributions to the spouse from the corpus, QTIPs are effective tools for preserving the settlor's assets for their descendants.¹²⁵ QTIPs are particularly useful and popular in second marriages, where one or both spouses may have children (often grown) from their previous marriages.¹²⁶ After 1993, this kind of trust, even when established by the settlor alone, with his assets only, with nary a thought given to Medicaid, could be deemed under Medicaid rules to be a "self-settled" trust established by his *wife*, at least in part, even though none of the assets were hers at the time the trust was established, if the settlor should happen to be the first to die and if the survivor fails to timely file her election to take against the will.¹²⁷ Should she choose to undermine her husband's trust, then of course she will receive her spousal share as set forth under applicable state law and that share will be counted as "available" to her for Medicaid purposes.¹²⁸ Should she fail to elect against the will, or choose not to, the same dollar amount will still be deemed "available" to her—but because her non-election causes those assets to "flow to" the trust (or to remain there if the trust was established *inter vivos*), then she has established the trust, at least in part, with "her" funds, making it (at least partially) a self-settled trust. The income, which is required to be paid to her, will of course be "hers," and if the trustee is given discretion to make distributions to her from corpus, then the amount

121. See generally Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & POL'Y 195 (1996).

122. See Moore & Landsman, *supra* note 52, at 76-78.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

equal to her elective share—at least—will be considered “available” to her under the self-settled trust rules.¹²⁹ “Her” funds, the portion of the corpus with which “she” established this trust, were (until recently) *his* assets, not hers; they were not necessarily accumulated during this marriage; and she has no *legally enforceable* claim by which she can actually get possession or control of them.

Of course, Medicaid does not need the elective share policy to reach this result. If, as in this case, the trust was established *inter vivos* (and was therefore not exempted as a testamentary trust), then the simple fact that it was established by the Medicaid beneficiary’s spouse would be sufficient to turn it into a “self-settled” trust.¹³⁰ If the couple heeded the advice of their estate planner and transferred title to all significant assets to the trustee of the trust, the good that was attempted in the MCCA will not be realized.¹³¹ How will case administrators choose one method of “deeming” this trust to be self-settled over another? Perhaps we could ask instead, what will stop them from choosing whichever results in the longest period of ineligibility? In practice, it would seem the choice would depend on the timing of the original establishment of the trust. If the husband settled the trust within 60 months of his spouse’s application for Medicaid benefits, then the rules would permit counting all the trust assets as if they were hers.¹³² If the trust were first established longer ago than that, then the date of her non-election of the spousal share may be the latest date that administrators could “deem” an “addition” was made to the trust.¹³³

But the problems do not stop there. Conjunct with use of a QTIP, many couples decide that the non-settlor spouse (“non-settlor” according to traditional analysis, not Medicaid counting rules) should execute an agreement to the trust (or to the will in the case of a testamentary trust). These agreements almost always include waivers of the spouse’s rights to take the statutory elective share. Such waivers are also predictable elements of marriage agreements (pre- and post-nuptial).¹³⁴ In subsequent marriages, especially when both spouses already have accumulated property and have children from

129. *Id.* If not, the trust is still “self-settled,” but the assets will be considered “transferred” and the look-back rules will apply. *Id.*

130. Moore & Landsman, *supra* note 52, at 76-78.

131. *Id.*

132. *Id.*

133. *Id.*

134. See, e.g., CCH, *Planning for Marriage, Divorce or Separation*, FINANCIAL AND ESTATE PLANNING GUIDE ¶ 2401 et seq. (14th ed. 2003).

their earlier marriages, such waivers are routine and ensure that each spouse's estate plan will proceed as desired.¹³⁵

It is not at all clear exactly what property right (if any) is being waived in such agreements. The elective share is an elusive thing, eliciting contradictory characterizations but inspiring very little careful analysis. It has been described as no property right at all; as an inchoate right which only "ripens" at the death of the spouse; and as a property right equal to any other, alienable at any time for valuable consideration in an arm's-length transaction.¹³⁶ Exactly what value that consideration will be worth is equally problematic. In addition to the contingent or inchoate nature of the right itself, its value (should it ever have any) depends entirely upon which assets, if any, might still remain in the spouse's estate.¹³⁷ Nevertheless, these agreements, however characterized, are today accepted in most jurisdictions and are considered to bind the waiving spouse and preclude later efforts to elect against the will.¹³⁸ When this casserole of legal theories is mixed with Medicaid's internally conflicting policies toward spousal assets in general and then served with Congress' now entrenched disregard for conventional theories of ownership, it would seem inevitable that some state court would eventually deliver an unappetizing decision on the matter.

One finally did.

IV. *MILLER V. KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES*

A case decided by the Kansas Supreme Court in 2003 offers an appropriate opportunity to re-examine Medicaid's treatment of elective share waivers. *Miller v. Kansas Department of Social and Rehabilitation Services*¹³⁹ has gone largely unnoted except for brief mentions (of varying accuracy) in a few practitioner publications.¹⁴⁰ In this decision, the Court applied Medicaid resource rules to reach a

135. Such assurance apparently is not acceptable, or not as acceptable, if either spouse ever needs long-term care in excess of what they can afford from their own resources. Medicaid's policy of forcing election of the statutory share demolishes that predictability, and the further requirement that states pursue estate recovery ensures that surviving spouses will never be allowed to recover financially or to exercise their rights of testation in any meaningful or reliable way. See *supra* notes 114-33 and accompanying text.

136. See *infra* notes 177-87 and accompanying text.

137. Or in whatever amalgamation will be collected for purposes of calculating the share; contemporary elective share law is itself somewhat slippery in its use of property concepts. See, e.g., *infra* notes 183-85 and accompanying text.

138. See, e.g., *infra* notes 183-85 and accompanying text.

139. 64 P.3d 395 (Kan. 2003).

140. E.g., PETER SPERO, MEDICAID, ASSET PROTECTION: LEGAL PLANNING, STRATEGIES AND FORMS (Supp. 2005), Ch. 14; RIA, *Trust Beneficiary and Eligibility for Medicaid*,

number of conclusions that are troubling in and of themselves and even more troubling when the argument supporting them is carefully teased apart.

The decision is difficult to read insofar as it bobs and weaves among a myriad of complex and interrelated ideas, interspersing that dance with bursts of condemnatory rhetoric aimed at the Millers and others like them. A number of facts are discussed that, in the end, are actually immaterial to the holding. The critical facts are as follows. On December 21, 1978, Mr. Miller executed a will that called for creation of a trust upon his death.¹⁴¹ One day later, Mrs. Miller signed a "consent to the will." The consent included a waiver of her right to take the elective share as set forth under Kansas law.¹⁴² On April 23, 1995—nearly 17 years after execution of both will and consent—Mr. Miller died.¹⁴³ Mrs. Miller served as executrix of her husband's estate. Probate concluded on January 30, 1996, nine months after Mr. Miller's death.¹⁴⁴ At that time, and pursuant to the terms of the will, a trust was established for Mrs. Miller's benefit during her lifetime, remainder to the couple's three children.¹⁴⁵ Between January 1996 and fall 2000, the trustee properly distributed all income to Mrs. Miller, amounting to approximately \$1,000 per month.¹⁴⁶ Mrs. Miller's health declined over the next few years and eventually she required care in a nursing home setting.¹⁴⁷ Mrs. Miller filed an application for Medicaid assistance on November 9, 2000.¹⁴⁸ Mrs. Miller's application for benefits (which under Medicaid regulations marks the terminal date of the applicable look-back period) was filed nearly 22 years after the will and consent were executed and nearly five years after the close of probate and the establishment of the trust.

Mrs. Miller's application for benefits was denied on the grounds that Mrs. Miller had the legal power to gain access to the corpus of the trust and that the entire trust estate (slightly more than \$190,000) was therefore an "available resource."¹⁴⁹ After administrative appeals, Mrs. Miller petitioned the district court for review of the de-

ESTATE PLANNING 464 (WG&L, Sept. 2003); *Case Law Developments*, 27 MENTAL & PHYSICAL DISABILITY L. REF. 390, 477 (May/June 2003).

141. *Miller v. Kansas Dept. of Social and Rehabilitation Servs.*, 64 P.3d 395, 397 (Kan. 2003).

142. *Miller*, 64 P.3d at 398. See also KAN. STAT. ANN. § 59-6a202 (2000).

143. *Miller*, 64 P.3d at 398.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Appellee's Brief at 2, *Miller v. Kansas Dept. of Social and Rehabilitation Servs.*, 64 P.3d 395, 397 (Kan. 2003) (No. 02-88761-A).

nial.¹⁵⁰ The district court reversed the administrative determinations, but upon further review, the Kansas Supreme Court agreed that the trust contained Mrs. Miller's funds and that she was therefore ineligible for Medicaid assistance.¹⁵¹

As a threshold matter, we must note with regret that neither the parties' briefs nor the Court's opinion offer much help in understanding the holding. This is an understandable outcome, for several reasons. First, as we have seen, Medicaid's counting rules sometimes use ordinary understandings of property but at other times turn familiar ideas inside out in order to block a perceived abuse.¹⁵² Moreover, the resource rules are not only quite complex, they also operate in a helter-skelter manner, sometimes marching on independently of each other, sometimes converging, sometimes harmonizing, and sometimes conflicting, until the entire matter seems to have gyred into a haphazard ricochet of ideas.¹⁵³ Finally, the exact way this interplay will unfold depends on both one's initial approach to the rules and on the order in which the rules are considered.¹⁵⁴ All in all, one can go very astray very quickly, either by starting off down a wrong or premature path, or by muddling the concepts while trying to put them in order, or even by simply hopping about too much, moving from one analytical idea to another and back again until it seems that one is either contradicting oneself or else hunting heffalumps.¹⁵⁵ Still, although caveats about reading between lines must abound, the Court's premises and the logical structure of its argument can reasonably be outlined as follows:

Premise 1: *Mrs. Miller was entitled to elect the statutory spousal share of her husband's estate upon his death, but she did not take the necessary action to do so.*

150. *Miller*, 64 P.3d at 398.

151. *Miller*, 64 P.3d at 397.

152. *See supra* notes 107-14 and accompanying text.

153. *Id.*

154. For example, a trust established by a spouse might have been done as special way to make a gift to the beneficiary. In that case, the self-settled trust rules might allow the assets to be deemed a) gifted to the beneficiary and then b) used to create a self-settled trust. But the converse is not true; if the beneficiary spouse made the gift, there would be no grounds for saying that the non-beneficiary spouse had settled the trust. *See supra* notes 107-114 and accompanying text.

155. A. A. MILNE, WINNIE THE POOH (1926). For a helpful analysis of the likely problems this could cause, see Sarah E. Shea et al., *Pathology in the Hundred Acre Wood: a neurodevelopmental perspective on A.A. Milne*, 163 CANADIAN MEDICAL ASS'N J. 1557 (2000).

- Premise 2: *Mrs. Miller's "action" (of not timely electing against her husband's will) caused her not to receive the elective share to which she was entitled.*
- P1+P2 = **Conclusion 1:** *That portion of her husband's estate that Mrs. Miller could have elected is "hers" under Medicaid rules regarding such "actions."*
- Premise 3: *As a direct result of these "actions," the assets were instead placed in trust pursuant to the terms of Mr. Miller's will.*
- Premise 4: *When a person's assets form all or part of the corpus of a trust and when that trust was established by that person (or their spouse, et c.) other than by will, that person has established all or part of the trust.¹⁵⁶*
- C1 + (P3 +P4) = **Conclusion 2:** *Mrs. Miller established at least part of the trust in question.*
- C2 + P4 = **Conclusion 3:** *That portion of the trust established with Mrs. Miller's assets is a "self-settled" trust.*
- Premise 5: *Any assets in a "self-settled" trust that can be distributed to a person by the trustee's permitted exercise of discretion are "available" to that person.*
- C3 + P5 = **Conclusion 4** (final determination): *All the assets in the "self-settled" portion of the trust are "available" to Mrs. Miller.*

With this structure before us, it becomes relatively simple to identify the problems lurking within in this decision. Two are especially notable.

The less troubling problem is built into the Medicaid rules themselves—it is a definition that is simply circular. To count as a "self-settled" trust, a trust must be established by the individual (or another of the listed parties) *and* be funded with the individual's own assets.¹⁵⁷ Both are required, but in a case like *Miller*, the two are functions of one another, leading to what would be called a "circular calculation" if it involved numbers on a tax return. The Court states that it was Mrs. Miller's handling of "her" assets (by allowing them to flow into the trust) that requires the trust to deemed "self-settled,"

156. 42 U.S.C. 1396p(d) (2000).

157. *Id.*

and yet, it is the fact that *her* actions established the trust (i.e., the fact that it is “self-settled”) that justifies classifying the assets as “hers.”¹⁵⁸ The assets are “available” and “hers” *only because* they are part of a self-settled trust—but it is the *fact that* the assets are “hers” that classifies the trust as “self-settled.” A similar quagmire is apparent in the Court’s insistence that the trust (or at least the portion settled by Mrs. Miller) was not established “by will” even though it is the fact that it was established by Mr. Miller’s will—and therefore not funded until the elective share issue was also allegedly present—that allows the Court to ignore the timing of the waiver, which, under any analysis, is well beyond the reach of even the most ruthless look-back period. This kind of bootstrapping may simply be unavoidable when all the far boundaries of every definition are drafted with a goal of inclusion of as much as possible. And in the larger scheme of things, the overlap of categories in this way is probably not especially harmful (although disorienting) except when it is used, as here, to justify counting of assets that simply should not have been in question in the first place.

And that brings us to perhaps the greatest difficulty, which is the Court’s initial premise that when her husband died, Mrs. Miller still had an elective-share right to half of Mr. Miller’s estate, which was hers to exercise at her pleasure. There simply is nothing in Kansas law or in the facts of this case to support this conclusion. Under applicable statutes, Mrs. Miller lost her right to elect against her husband’s will when she signed the consent to the will in 1978—almost 17 years before Mr. Miller’s death and nearly 22 years before Mrs. Miller applied for Medicaid assistance. Kansas has as part of its code a version of the Uniform Premarital Agreement Act, which was enacted in 1988, fully ten years before Mr. Miller died.¹⁵⁹ This Act not only explicitly authorizes the surrender of marital rights by way of contract, it also explicitly authorizes the use of such contracts in the context of wills, trusts, “or other arrangements” made to carry out the provisions of the agreement.¹⁶⁰ And although the Legislature supported the traditional goal of the elective share, to prevent disinheritance of the surviving spouse, lawmakers authorized the Act with the expectation it would accomplish equally important goals, such as providing spouses with “broad freedom of disposition,” easing estate administration, providing predictability “for persons who adequately plan their estates,” and, in appropriate circumstances, even *preventing* the widowed

158. *Id.*

159. KAN. STAT. ANN. § 23-801 (2000).

160. KAN. STAT. ANN. § 23-804 (2000).

spouse from choosing the elective share.”¹⁶¹ Although the Act applies only prospectively and does not cover agreements entered into after marriage, the only reported case to be decided under the Act involved a dispute over precisely this same fact pattern—a post-nuptial agreement entered into prior to the effective date of the Act.¹⁶² In that decision, the Kansas Supreme Court upheld the validity and enforceability of such an agreement even when one of the parties fails to fully disclose such material facts as the value of his assets, provided the agreement was entered into voluntarily and met the technical requirements of the statute (such as the requirement of a writing).¹⁶³

As noted earlier, courts are inclined to uphold the inclusion of elective share assets when the surviving spouse neglects those rights and thereby allows the assets to benefit someone else, especially when that failure serves to create or preserve Medicaid eligibility. But counting as “available” those assets that could have been owned had the surviving spouse simply enforced a claim in hand appears to be a reasonable application of the long-established practice of defining “property,” for Medicaid purposes, in terms of property *rights*. Indeed, the elective share is surely among the easiest “enforceable claims” to actually enforce; all that is usually required is that the survivor timely file the appropriate form and, perhaps, appear at a hearing on the matter.¹⁶⁴ It is a very far cry from that kind of “enforceable right” to a situation like the one in *Miller*, where the right in question not only was waived by an agreement explicitly authorized by statute and supported by the state Supreme Court, but where that waiver was executed nearly two decades earlier. It is instructive to consider in its entirety, as Mrs. Miller did in her brief, the administrative regulation that controls such cases in Kansas:

Resources shall be considered available both when actually available and when the applicant or recipient has the legal ability to make them available. A resource shall be considered unavailable when there is a legal impediment that precludes the disposal of the resource. The applicant or recipient shall pursue reasonable steps to overcome the legal impediment unless it is determined that the cost of pursuing legal action would be more than the applicant or recipient would

161. Timothy P. O’Sullivan & Joan M. Bowen, *New Spousal Elective-Share Rights: Leveling The Playing Field*, 65 J KAN. BAR. ASSOC. 18 (Mar. 1996).

162. *Davis v. Miller*, 7 P.3d 1223 (Kan. 2000).

163. *Davis*, 7 P.3d at 1230. Not only did the Court find the agreement valid, it upheld the agreement’s provisions regarding attorney’s fees and awarded more than \$300,000 for the cost of defense. *Id.* at 1234.

164. “Easiest to enforce,” however, is not the same as easy to administer; see *infra* notes 169-72 and accompanying text.

gain, or the likelihood of succeeding in the legal action would be unfavorable to the applicant or recipient.¹⁶⁵

The Court remarked rather off-handedly that Mr. Miller “could have changed [the 1978 will] at any time without [Mrs. Miller’s] approval,”¹⁶⁶ but that knife cuts both ways. Yes, Mr. Miller could have changed his will at any time, but Mrs. Miller could have revoked her waiver at any time, too. The fact that she did not, despite the passage of many years and enactment of a law highlighting the agreement’s enforceability, must be taken as evidence in favor of enforcing the waiver, and not the reverse. Even if we pardon the court for overlooking this fact, Mr. Miller’s ability to change his will seems legally immaterial. Because Mrs. Miller’s waiver was part of a consent to *the 1978 will*, and not a freestanding document, Mr. Miller’s revocation of that will would simply render the waiver mildly absurd insofar as its key premise (and, arguably, the consideration for the bargain) would be non-existent.

Alternatively, this apparent lack of actionable damages may be precisely what is misleading the Court. In some jurisdictions, courts have considered the ambulatory nature of wills, the ease with which they can be revoked, and the unenforceability of their contents so long as the testator lives to be evidence that a will simply has no legal effect—even, perhaps, could be said not to exist—until the testator’s death.¹⁶⁷ Those jurisdictions are not wrong, because a will is somewhat singular insofar as it is typically the act of one person acting alone. But in most jurisdictions, and certainly in Kansas, that changes the moment the testator involves another by way of bargain and agreement. Not only are elective share waivers valid and binding in Kansas, so are waivers of inheritances, contracts to make or not revoke a will, and even a revocation of a will itself.¹⁶⁸ If the waiver was valid, the assets should be deemed unavailable.

Not only is Mrs. Miller’s waiver binding upon her, Mr. Miller would not be hog-tied by its revocation in any case. There are numerous ways besides waiver to limit a spouse’s elective share rights under Kansas law, such as making outright gifts or transferring assets to revocable joint tenancies, irrevocable out-of-state accounts with POD designations, family limited partnerships, or limited liability compa-

165. Appellee’s Brief at 6, *Miller* (No. 02-88761-A).

166. *Miller*, 64 P.3d at 402.

167. See, e.g., *JESSE DUKEMINIER AND STANLEY JOHANSEN, WILLS, TRUSTS & ESTATES* 297 (2002).

168. Kansas is a “once revoked, always revoked” jurisdiction; generally, a testator who revokes a second will must republish the first or die intestate, even if the first will was validly executed and is available at the testator’s death. *KAN. STAT. ANN.* § 59-612 (2000).

nies.¹⁶⁹ This underlines yet another problem with the Court's first premise, and that is the very superficial consideration given to what, exactly, that elective share right might be worth. The Court correctly notes that the Mrs. Miller's statutory share (had she not waived it) should be calculated as fifty percent of Mr. Miller's augmented estate, but it goes on to undermine its own credibility by pronouncing, in less than fifty words and without even a mention (much less a calculation) of the value of nonprobate assets owned or transferred by either spouse. Kansas has enacted a version of the Uniform Probate Code's "augmented estate" approach to calculating the elective share, and the calculation of that augmented estate is not simple.¹⁷⁰ Correct determination of the elective share requires a complete inventory and valuation of the decedent's probate assets, allowances granted by statute, dozens of varieties of assets that the decedent *or* the surviving spouse might have owned, nonprobate transfers previously made to the surviving spouse (including the value of interests held in trust) the surviving spouse's presently held property, and assets disclaimed by the spouse that pass to children.¹⁷¹ In addition, Kansas' elective share is "supplemental," meaning that the spouse does not necessarily have to renounce the estate plan and take the elective share instead, but can add assets from the augmented estate to the assets that pass under the plan in order to reach the statutorily required dollar amount.¹⁷² Thus, even if Mrs. Miller's elective share rights really had awaited undisturbed, their value under the statute cannot be determined from the information in the opinion; nor can we tell whether anything would be due her beyond what she already had received. Whether any of this could be approximated fairly by handing her a neatly drawn half of the probate pie is simply unpredictable on these facts.

All this nuance is lost, however. The Court simply breezes past this seemingly insurmountable problem without ever articulating the basis for its conclusion that Mrs. Miller's elective share right was still enforceable when the trust was established. The reason is clear when we stop and look at the case as a whole. The Court is reasoning from an already-formed conclusion, and, as is always true in hindsight, the overlap of categories seems inevitable and obvious. The Court describes its decision as consistent with its own commitment to "substance over form," with Congressional intent, and with public policy. The Court maintains that its holding will prevent Mrs. Miller "from having her cake and eating it, too," presumably by qualifying for

169. O'Sullivan & Bowen, *supra* note 161, at 18.

170. KAN. STAT. ANN. § 59-6a201 (2000).

171. KAN. STAT. ANN. § 59-6a201 (2000).

172. KAN. STAT. ANN. § 59-6a202 (2000).

Medicaid benefits while still enjoying distributions from the trust. In the next sentence, the Court also states that its holding will prevent Mrs. Miller's daughter, sole trustee and one of three remainder beneficiaries under the trust, from being overly tempted "to make her own slice of the cake larger at the expense of taxpayers," and comments that this daughter has "at least a theoretical incentive" to manipulate distributions in a way that "leaves a maximum inheritance for herself and her brothers."¹⁷³ Anyone who has any doubt about the Court's determination to enforce what it perceives to be policy need only review the parties' briefs. There, they will find that the Court incorporated large portions of the Department's brief with almost no editing.¹⁷⁴ Had the brief been well-argued or reached a better conclusion, this might not be problematic. As it is, it creates at least the appearance that the Court really did not care about the legal soundness of its method because it was so swept up in the righteousness of the Department's goal.

But is this really so objectionable? In light of the ever-growing demand for unaffordable health care services, and after considering the many families in need of assistance who have no assets at all to shield for their children, and once we are confident that Congress does, indeed, intend to recoup as much of these long-term care costs as it possibly can, whether from beneficiaries or spouses or heirs apparent—in the face of all of that, isn't the Court's conclusion appropriate—even, dare we say, *right*? And if it is, does it really matter that the arguments they used to get there are flawed?

We must believe it does, for several reasons. First, courts have a duty to apply the law as it stands, whether that leads to "good" or "right" results or not. If the regulations as they stand would allow the Millers to "have their cake and eat it too" by shielding assets for their children's future, and if it is Congress' intention to "eliminate" any and all "formalistic devices" that allow beneficiary assets to go to heirs, then surely it is Congress's job to close that loophole, not the job of the courts'. While it is reasonable to consult legislative intent to help interpret laws and regulations when their meaning or application are unclear, it is beyond any court's authority simply to rewrite the law from the bench.

A second reason, related to the first, is that poorly reasoned rulings make unhelpful precedent. Analysis of "resources" or "assets" or "property" or "ownership"—whether for Medicaid, fraudulent transfer

173. That these two results are mutually exclusive either escapes the Court's notice or does not interest it.

174. See generally Appellant's Brief, *Miller v. Kansas Dept. of Social and Rehabilitation Servs.*, 64 P.3d 395, 397 (Kan. 2003) (No. 02-88761-A).

statutes, estate taxes, elective shares, or other highly regulated schemes—seems generally to begin with the belief that the “bundle of sticks” we were taught that property is can be untied, stacked in clear categories, and dealt with cleanly by legislatures and courts. When that method of analysis fails to reach desired policy results because of changing social circumstances (such as escalating health care costs coupled with increasingly sophisticated estate planning techniques), there seems to be a temptation to resort to *ad hominem* arguments. Each side begins to accuse the other of nefarious motives and irresponsible scheming, as if such charges, once proven, would justify a decision to ignore the neat piles of sticks altogether and dispense with efforts at careful analysis. Thus the analysis of assets held in trust, once based only on traditional ideas of ownership, enforceable rights, and gratuitous transfers, began to shift focus to the applicant’s real or imputed intent to shield assets. Traditional property concepts were expanded, redefined, analogized, and further deformed until the *Miller* analysis seems inevitable despite its problems.

But what then? Where does *Miller* lead? Once the analysis of assets is unhooked from concepts of ownership, control, or the enforceable right to either of those, upon what analysis does the court base its future judgments? *Miller* seems to stand for the proposition that anyone who has used ever used a trust as part of an estate plan and has assets in the trust when they apply for Medicaid must be barred from benefits for as long as possible, no matter when the estate plan was created or what form it takes. If that is the goal, then why continue using a look-back period at all? Why not count all assets *ever* transferred into trust? Indeed, why not count all assets ever transferred at all, such as *inter vivos* gifts? For that matter, why limit such treatment only to “transfers”? Why not also count as “available assets” those dollars the applicant may have “wasted” on gambling, or smoking, or drinking, especially since those practices have a direct effect on the overall cost of that individual’s health care? And why limit inclusion of surrendered rights to those granted by statute, like inheritance or the elective share? Why not include as “available assets,” for example, the total amount that could have been payable by long-term care insurance had the applicant taken the necessary action to create that enforceable claim?

It is easy to criticize the *Miller* decision through such a game of “Slippery Slope”—easy, but not especially helpful. It is just as easy, and just as unhelpful, to condemn as conniving cheats all those who attempt to preserve some of their life’s savings for the care of their spouse or children. And this points to the third, perhaps most important reason to care about the rationale of the *Miller* decision. The Court’s opinion, although not well supported by current law and per-

haps unwise as precedent, is nevertheless neither absurd nor even really objectionable in light of the immense pressures that besiege Medicaid and other welfare programs in this century. And although in this case it is not at all apparent that the Millers made their estate plans with Medicaid qualification in mind, thousands of citizens do attempt such "schemes" every year. Ethical arguments do not seem to have much real force in this situation. Whenever a nation reaches a time when the attempt to provide a necessity like health care to its citizens requires legislators to ignore, rewrite, or jettison centuries of legal principles; when even its best, most conscientious citizens feel justified in attempting to circumvent the clear intent of a law or system of regulations; and when courts resort to murky argument to reach previously determined results regardless of the actual law—surely something very serious is going on. Is there any other way to understand these two contradictory forces doing battle over Medicaid? Must we either support the court's misguided analysis of property rights or else absolve those who dodge the clear intent of the law?

In fact, a more helpful analysis is possible, if we take a closer look at the elective share right in its deeper historical context. Assuming the *Miller* court's sincerity in its fervent conclusions about the nature of Mrs. Miller's rights, it seems clear that the elective share is one of those property rights that is "not like the others."¹⁷⁵ The *Miller* court is hardly the first to have trouble sorting out the nature of the elective share right or waivers thereof. Perhaps uniquely so, the elective share and its conceptual ancestors, the common law rights of dower and curtesy, confound most who attempt to describe them, and have given rise to a wide assortment of conflicting and confusing law. In this history of puzzled ideas, however, we just might find the perspective we need to understand the struggles every society endures over allocation of scarce resources.

V. A LESSER TENURE

In American case law, the elective share right, and dower before it,¹⁷⁶ has been characterized as everything from "evanescent" to "present, fixed, and valuable." Typically, it is referred to as an "inchoate"

175. Joe Raposo and Jon Stone, *One of These Things is Not Like the Other*, *SESAME STREET* (Nov. 10, 1969).

176. Although much of the following analysis could be applied to curtesy as well, this article will limit its comments to dower in particular, largely because while neither concept is explicated at length in the available resources, curtesy is even more obscure than dower. It also must be acknowledged that most of what we know of dower pertains to the landed classes only. Tenants of the lower classes typically did not have dower rights or obligations.

property right,¹⁷⁷ but that scarcely does more than beg the question. It has been called an "encumbrance with no possibility of action until consummated,"¹⁷⁸ a "mere expectancy,"¹⁷⁹ unknowable, undefined, and imperfect. Alternatively, it has been labeled a vested property right,¹⁸⁰ an alienable estate, or at the very least, "something more than a mere naked possibility."¹⁸¹ It has been characterized as a hybrid, part property right and part lien;¹⁸² as a right of support;¹⁸³ as a chose-in-action;¹⁸⁴ a customary interest;¹⁸⁵ an obligation;¹⁸⁶ or a claim subject only to release or extinguishment.¹⁸⁷ In short, some consider it to be an actual property right, while others who think it too weak, too contingent, and too speculative to rise to that level. But while the elective share certainly is a right established by statute today, its origins are as old as those of any estate known to English property law, which seems to have understood dower as exactly that: an estate in land, with all the qualities implied by that label. That understanding dissipated, however, as property law evolved and the idea of "property" itself changed from a system of relationships to a market of commodities.

The subject matter of "estates in land" sometimes appear from a 21st century perspective to be not only ancient, but monolithic. Learning the old system of tenures is tedious for most and tends to be tackled topically, usually with only the barest chance to take in the progress and political bargaining that kept the system whirling with change in its own day. It is easy to forget, then, that within a scant 300 years of the Conquest, the feudal system credited to William I had already begun to unravel.¹⁸⁸ Perfectly "obvious" meanings of grants were construed by statute and case law to mean something other than what the terms clearly said, and these differences directly reflected the social pressures of the time.¹⁸⁹ Two competing concepts of landholding evolved into the confusing hybrid that characterized English

177. See, e.g., *Webber v. Webber*, 962 S.W. 2d 345 (Ark. 1998).

178. See, e.g., *Meadows v. Belknap*, 483 S.E.2d 826 (W.Va. 1997).

179. See, e.g., *Classen v. Heath*, 58 N.E.2d 889 (Ill. 1945).

180. See, e.g., *Wigginton v. Leech's Adm'x*, 149 S.W.2d 531 (Ky. 1941).

181. See *Morgan v. Morgan*, 1 Ohio Supp. 51 (Ohio Com. Pl. 1936).

182. See, e.g., *Pawley v. Pawley*, 46 So.2d 464, 464 n.2 (Fla. 1950).

183. See, e.g., *Bradford v. Parker*, 99 N.E.2d 537 (Mass. 1951).

184. See *Grubbs v. Leyendecker*, 53 N.E. 940, 941 (Ind. 1899).

185. See, e.g., *Harris v. Powers*, 58 S.E. 1030, 1038 (Ga. 1907).

186. See, e.g., *Wolfe v. Wolfe*, 350 N.E.2d 413 (Ohio 1976).

187. See, e.g., *Auerbach v. Chase Nat. Bank of New York*, 296 N.Y.S. 487 (N.Y. App. Distr. 1937). Commentary on dower was muddled as early as Coke. See, e.g., *Harris*, 58 S.E. at 1039 (quoting Blackstone, et al.). For an intriguing look at original documents, see Thomas Lund, *Women in the Early Common Law*, 1997 UTAH L. REV. 1.

188. See *infra* notes 224-29 and accompanying text.

189. See *infra* notes 219-23 and accompanying text.

land law for hundreds of years and that still colors American attitudes despite two centuries of political rhetoric to the contrary.

Whether William imposed a "new" system of land-holding on the Anglo-Saxons or merely substituted his men into a hierarchy long established remains open to debate.¹⁹⁰ Either way, his own philosophy of property law was clear: He, and only he, owned England.¹⁹¹ Everyone else who possessed land did so by grant of the King and could claim a right of possession only, not ownership.¹⁹² Thus it was that the writ of right, the oldest cause of action, was a means for determining the *better* right of *possession* between two claimants, and no more.¹⁹³ Usually both claimants or their ancestors had possessed the land at one time,¹⁹⁴ but under William's lordship neither could claim "title" because none could be absolute owner but William himself. When William planted his barons on English manors, he retained certain interests that both evidenced and effected his continuing ownership.¹⁹⁵ These grants were nothing like "conveyances" of land today, in part because they were based on the split of property interests between lord and tenant, but even more because of the different comprehension of land and society that held sway at the time. Land was not a commodity with an ascertainable value available for exchange between strangers at market. Land was, instead, a link between ruler and ruled; William granted a right of possession to repay his barons for their loyalty, yes, but also to *keep* their loyalty in the future.¹⁹⁶ The barons, in turn, enjoyed the fruits of the land, but owed that enjoyment to William; consequently, they were required to convey back to William some of those fruits, the so-called incidents and services.¹⁹⁷ And William, owner though he may be in title, depended on the barons to provide the knight service and raw materials necessary to make his kingdom secure. Though the barons were obliged to give, William himself was obliged in return, first to protect, and further to manage.¹⁹⁸ It was essential for William to "grow" the kingdom in ways advantageous and pleasing to his tenants-in-chief. Each baron who subinfeudated the land in turn likewise retained certain interests but also likewise took on certain obligations and responsibilities.¹⁹⁹ This

190. R. ALLEN BROWN, *ORIGINS OF ENGLISH FEUDALISM* 17-20 (1973).

191. Mark A. Senn, *English Life and Law in the Time of the Black Death*, 38 *REAL PROP. PROB. & TR. J.* 507, 519 (2003).

192. *Id.* at 519-20.

193. *Id.* at 539.

194. *Id.*

195. *Id.* at 540-42, 548-54.

196. *Id.* at 540-42.

197. *Id.*

198. *Id.* at 523-24, 542.

199. *Id.* at 530-31, 556.

intricate system of mutual and reciprocal obligations really did not require land except insofar as land was, in the 11th century, the primary source for most things required for human sustenance and success.²⁰⁰ Land was the *source* of value and served to mediate the obligations between lords and tenants.

And so, a grant was a description of the relationship between the grantor and the grantee with regard to the land, yes, but also with regard to every other aspect of their intersecting lives. Grants were thus very personal. William granted tenures only to those men he knew and trusted, and mesne lords did the same, because the grant had no real value outside of the ability and inclination of the parties to perform as they promised.²⁰¹ Any change in the parties to the grant, such as the death of the tenant, brought the entire relationship to a halt,²⁰² and transfer to another was not permitted without explicit consent of the lord,²⁰³ a reasonable restriction in light of the very personal nature of this relationship. The land mediated these transitions, as the lord was expected—first by custom and then by law—to accept the deceased tenant's eldest son as replacement so long as he could pay the "relief" that was due. But land was not the only mediator. Other humans also served that capacity. The lord was expected to accept the heir, but the heir was not always of age when his father died; each lord therefore had a duty to serve as guardian of minor heirs and widows of his tenants.²⁰⁴ That duty, of course, also brought certain benefits to compensate: the lord had a right to manage and keep a portion of the minor's estate and to arrange and command a fee for any marriages of either wards or widows.²⁰⁵

Almost immediately after the Conquest, the King's many tenants (and their many tenants below them) began maneuvering for ways to gain greater advantage from this relationship. Conveyances were drafted "to A and his heirs" in an effort to gather up future generations as additional purchasers and defeat the requirement to pay "relief" to the lord upon the original tenant's death; the effort was defeated by the rule later articulated in *Abel's Case*²⁰⁶ (but better known as it appeared much later in *Shelley's Case*),²⁰⁷ which held that the phrase "and his heirs" most certainly did *not* mean that A's heirs held a remainder as purchasers.²⁰⁸ The lords had to concede, how-

200. *Id.* at 528.

201. *Id.* at 516.

202. *Id.* at 541-42, 551.

203. *Id.*

204. *Id.* at 551-52.

205. *Id.*

206. Y.B. 18 Edw. II 577 (1324).

207. 76 Eng. Rep. 110 (KB 1581).

208. Senn, *supra* note 191, at 554.

ever, that the words did mean something—in this case, that the tenant's heirs had a right to be accepted in place of their fathers and could not be denied.²⁰⁹ Tenants appeared to win one battle when courts held that a grant to "A and the heirs of his body" was converted to the more easily alienated fee simple upon the birth of a child,²¹⁰ but promptly lost the next as the Statute De Donis rewrote the law to force an entail upon such estates nevertheless.²¹¹ Tenants needing some cash in hand would subinfeudate another, as was their right, but often reduced or eliminated the incidents owed in an effort to win a higher price from the deal.²¹² Lords left holding these worthless incidents after the death of the original tenant then struggled to block such transfers, finally compromising in the Statute Quia Emptores.²¹³ Quia Emptores prohibited subinfeudation and its concomitant dilution of the incidents but required lords to allow substitution upon a fee, which made estates freely alienable and also cut into the very heart of the personal relationships of the manor.²¹⁴

By 1300 or so, this push and pull had flattened the feudal pyramid and frozen the estates as they stood.²¹⁵ Estates were alienable without regard to the personalities involved and the feudal obligations generally could be satisfied with money payments in lieu of service.²¹⁶ This de-personalization of the land-holding relationship continued until the Statute of Tenures in 1646 finally eliminated the last vestiges of feudal obligations.²¹⁷ Land that for centuries had bound citizens to one another in complex and reciprocal layers of obligation and duty had become a mere commodity.

From the commodity perspective, which still dominates today, the widow's right to a lifetime interest in her husband's property cannot be imagined as anything but either a property right itself, or some other kind of right, such as a right of action. But from the perspective of 11th century England, dower was no more complex than any other "estate in land." It has been called, in fact, a tenure itself—just like knight service, frankalmoign, serjeanty, or socage—although generally is classified among the "lesser" tenures.²¹⁸ Like any other tenure, it was not merely a right to possess or transfer land, at least not in the

209. *Id.*

210. *Id.* at 555.

211. Statute of Westminster II, 13 Edw. 1 (1285).

212. Senn, *supra* note 191, at 557.

213. 18 Edw. I (1290).

214. Senn, *supra* note 191, at 556-58.

215. *Id.* at 558.

216. *Id.* at 525, 526, 548, 553, 555, 559, 577.

217. *Id.* at 548.

218. *Id.* at 547.

beginning. It was an agreed-upon set of mutual and reciprocal duties and obligations, a formalized relationship between the parties.

But who were the parties? Dower has often been characterized as a right granted to the wife by the husband upon marriage, but its origins pre-date the age of free alienability of land. Substitution came only after a struggle, and sales took much longer. Grants of tenure became inheritable only gradually, and land did not become devisable by will until very late.²¹⁹ It cannot be entirely accurate, therefore, to say that dower was granted by husband to wife, because the husband simply held no posthumous rights to grant. The death of the husband ended his tenure, and the estate then reverted naturally to the lord.²²⁰ Not surprisingly, then, it is the lord who owed a duty of support to the widow after her husband died.²²¹ And bound in duty though he was, the lord also had the power to arrange (and receive a fee for) the widow's re-marriage.²²² Upon that re-marriage, the widow lost her right to support from that lord, but it was replaced by the same right with regard to her new husband's lord instead. The dower estate, then, appears to have functioned perhaps more as a set of reciprocal rights and duties between the wife and her husband's lord, rather than between the wife and her husband.

Dower was not just a right (or duty) to support, however; it also was a limit on the husband's ability to alienate his possessory rights. Left undisturbed by lifetime transactions, the land of which the husband died seised could be expected to provide the required support for the widow until she could be married off. But the advance of tenants' rights to alienate their holdings during lifetime compromised the lord's ability to depend on those lands to fulfill his duties to the tenant's widow—unless, of course, the lord could ensure that the lands originally granted to the husband would still be available.²²³ This is dower's other side. So often characterized as an "encumbrance" or a "lien" or simply a "hindrance to alienability," dower not only promised support to the widow, but also served to "call back" for this use any

219. These are hard dates to specify, because although the practices were not authorized with regard to estates in land until, in some cases, as late as the 19th century, the practices had been evolving all along. See Senn, *supra* note 191, *passim*.

220. Senn, *supra* note 191, at 550.

221. *Id.* at 547, 551-52.

222. *Id.* at 551.

223. It might be assumed that if the grant was made to the dead man's heir, as expected, and if that heir was also a child of the widow, then surely the lord's duties would be satisfied in practice if not at law. But the heir was not necessarily (or even frequently) the son of the woman who was wife to his father at the time of his death, as a woman's chance of dying early, usually in childbirth, was very high. Moreover, sons do not always take the best care of their widowed mothers, as countless records would seem to indicate. A lord who relied on the heir to provide for the widow did so at his own peril.

lands the husband might have alienated during lifetime. It operated as a fail-safe for the lord, a means of re-capturing estates transferred out of his control, at least for so long as necessary to provide for the widow (i.e., until her re-marriage). Dower thereby also operated as a discouragement to husbands wanting to sell their possessory rights to strangers—a deterrent to alienation of estates, or at least a strong down-regulator of possible profit.

Seen this way, dower closely resembles the heir's right to take the father's tenure once he died. This right could not be enforced—indeed, the holder of the right could not even be identified—until the father's death, making it arguable that the heir's "right" was not really a "right" at all but rather a duty upon the lord. Wardship could be characterized similarly: upon a grant of tenure (with its included duty to enfeoff the tenant's heir upon the tenant's death), the lord assumed a duty to care for and raise a minor heir until he could be enfeoffed, but kept the right to the proceeds of the estate during the interim, both as a resource for raising the heir and as a compensation for doing so.²²⁴ The "rights" of both widow and heir, therefore, were not truly "their" rights at all, but were duties that grew directly out of the original grant to the husband/father. When a tenant received a grant of tenure, he gained not only a right of possession in this life but a set of promises regarding his family's welfare after his death. In return, the lord kept the reversion of that right of possession, which would enable him to keep those promises. Alienation of that right of possession threatened not only the value of the incidents and therefore the lord's ability to fulfill his obligations up the feudal chain to his own lord; it also threatened the lord's ability to fulfill his obligations down the feudal chain, to keep the promises he had made when he first granted the estate.

The confusing nature of dower becomes clearer when we consider it this way, *in situ*, lodged as it once was in this complex of relationships and obligations. Husbands desiring possession of land promised payment of incidents to the lord and accepted promises of security for their heir and their widow, and in so doing also accepted limitations on the freedom to alienate of their interests. Lords desiring profitable, productive land promised their tenants quiet enjoyment of possession and accepted duties of wardship and dower, and in so doing gained the profits that might result as well, ranging from the fees paid upon marriage to the deterrent effect upon alienation. Each promise attendant to the grant therefore carried a benefit to the promisor, and each benefit claimed by either party came with duties attendant. Every blessing was burdened, and every burden was blessed.

224. Senn, *supra* note 191, at 551.

VI. PENTIMENTO

As the feudal matrix grew increasingly impersonal, of course, these very personal duties faded.²²⁵ In the Colonies, landholding was deliberately characterized from the start as *allodial*—that is, ownership was outright with no obligations and no lord attendant. Just as the earliest knight service became convertible to a cash payment in a relatively short period of time, each of the reciprocal promises, duties, and rights originally imbedded in the grant of tenure came to be seen as commodities convertible to a money value.²²⁶ Property rights ceased to be varieties of personal obligation and became objects of trade among strangers.²²⁷ The perspectives, concepts and categories of feudal thought, especially this idea of benefits burdened by obligation, seemed to fade away. Egalitarian aspirations notwithstanding, however, they did not die. Instead, they found their way underground and dwelt quietly, their influence mostly unobservable until the right circumstance might suddenly render transparent the layers of history and theory painted over them. The decision in *Miller* seems to be such a circumstance.

Our bafflement or even offense at the court's apparent willingness to undermine our understanding of property rights, to do so even when the applicant appears to have had no malice or desire to defraud, reflects our sense that something about the decision is not aligned with what we thought we knew. But the Court's anger at the use of such waivers, its diatribe against estate planning techniques that "divert scarce federal and state resources" away from the poor seems entirely justifiable as well, however badly argued. Reconciling these reactions is not easy. If we claim that *Miller* is wrong because it ignores essential concepts of property law, then we hobble not only courts, but legislatures, too, as they struggle to balance the conflicting needs of society. If we claim that these common law concepts have no role in such a highly regulated program as Medicaid, then we leave every person in our society uncertain of their rights and vulnerable to the whims of statute and individual judges.²²⁸

I would suggest that *Miller* disrupts our equilibrium only because it flies in the face of our *modern* ways of thinking. When we remember that Mrs. Miller's elective share is the child of dower and the other feudal tenures, however, we understand that our discomfiture is just the age-old struggle between the same two views of property, as either the ownership and control of an impersonal commodity on the one

225. See *supra* notes 206-17 and accompanying text.

226. *Id.*

227. *Id.*

228. Senn, *supra* note 191, at 519.

hand, or as a complex set of mutual and reciprocal personal obligations on the other.²²⁹ The relational view of property law, which held sway for a few centuries after the Conquest, evolved and then seemed to disappear in response to the enormous economic pressures from the culture at large.²³⁰ But it did not truly vanish; instead, it went underground. Small wonder, then, that intense economic pressures once again seem to be shifting the tectonic plates of our understanding, lifting this relational view up again and offering it as an overarching truth. Any doubt remaining clears like mist when we consider one more ancient principle of property law—the doctrine of escheat.

We want to believe that we own what we own, with no lord to answer to, but the still lively idea of escheat belies our confidence. In escheat, the estate of one who dies without heirs becomes the property of the state.²³¹ The precise rules of escheat are set forth by statute and vary from state to state, but they all come from the same ancient common law of property, in which *every* estate returned to the lord upon the death of the tenant, to be re-granted at the lord's pleasure.²³² Yes, the landed class exerted enough pressure to win the "right" of their heir to be accepted whether the lord liked him or not; and yes, the landed class went on to exert sufficient additional pressure to win the right to devise property to whomever they wished; but the very interest being devised, the "right" to the "property" itself, remained at heart a *grant*—perhaps most immediately from some mesne lord, but ultimately from the only party who actually "owned" anything, the King.²³³

And so it remains today. We can say we "own" our property, and we can mean by that "ownership" our "right" to transfer that property in almost any way we wish. But we must remember that our forebears gained that freedom to trade and alienate property by relinquishing their claims to the duties that lords once owed them. Our long-standing habit of viewing our property "rights" as natural rights free of obligation to any lord is a coin that carries as its obverse the reciprocal loss of sovereign obligation to support our material needs. When we turned to the King (or his modern equivalent, the State) in these recent days, asking for assurance of health care in our old age, asking that provisions be made when our needs exceed our ability to "buy," asking for the lord to protect and ensure our welfare, perhaps we gave too little thought to the burdens that would necessarily attend such blessings. Our property "rights" today are as much a

229. *Id.* at 525, 547.

230. *Id.* at 541-42, 550-51.

231. *Id.*

232. *See supra* notes 201-03 and accompanying text.

233. *See supra* notes 190-99 and accompanying text.

“grant” from our Sovereign as they ever were, no less so because we now elect our fellows to sit on the throne. Americans believe that our ability to leave property to our children or other family members is an inviolable right, but we forget that the right to own and transmit property is always a creation of the State. However many names enter the chain of title between us, we always ultimately hold “of the King.” Requests for the sovereign to assume (once again) any duties to provide for us should be made knowing full well that we will necessarily lose some of those “natural” rights. Nothing else would be reasonable. Without the tools necessary to deter our alienation of resources for quick cash, the sovereign will have no way to ensure that our needs can be met.

None of this excuses the sovereign from due care, however. As in the feudal matrix, the sovereign’s power over property does not simply fall out of the sky; it is bargained for in the original grant and must be paid for by the fulfillment of those duties. And whereas all lords in the Middle Ages were tenants of someone else also, today the sovereign has no such intermediary to keep it humble, only impersonal departments applying fixed rules to fungible assets in a market economy. Any such sovereign who meddles with “rights” without a clear commitment to and explanation of the duties it will assume in return does so in peril of the next election.

Reframing the issue of Medicaid qualification, among others, might help our legislatures ask new questions, or ask the old questions with new insight. What *are* the duties of the government to provide health care for its citizens? What duties has it already assumed, and which are beyond its capacity under any system? What property “rights” do citizens have—and which do we get to keep? Which are “natural” and therefore inviolable, and which are subject to our bargaining with our sovereign? What loss of property rights is necessary and sufficient to enable the government to fulfill its duties? Can it be done by abridging only those property “rights” that are not “natural” but are subject to the bargain? *Whose* property rights should be abridged—those seeking government dollars with which to purchase health care? Or those seeking dollars for the care that they provide? Is there any defensible distinction between the two? What relative proportion of burden should each sector bear in light of the benefits each receives?

The *Miller* court mischaracterized the elective share as being “available” to Mrs. Miller in clear contravention of both the facts and common sense—at least, the common sense of 21st century property law. Under any “normal” property rights analysis, her access to that elective share was long gone by the time her need for Medicaid arose,

and nothing was helped by denying it louder. What the Court intuited but did not fully realize was that it required a different analytical framework altogether, one that uses the language of mutual obligations and reciprocal duties rather than the language of "property rights" and implied thievery. An analysis based in reciprocity might embolden legislatures to re-cast the Medicaid eligibility rules in ways that are more "harsh" on their face but also more honest in their effect—e.g., they could decide to disregard the look-back period entirely for transfers that cause certain *results*, regardless of the theory of the *transfer*. If our elected sovereign wants to make Medicaid benefits contingent on the prohibition of *any* assets escaping the government's reach, it can reach that result more easily and honorably by fiat than by incremental attempts to squeeze such results out of a rights-based analysis. Until legislatures find a way to remove Medicaid qualification from rights-based analysis entirely, the courts really are not equipped to enforce Medicaid "policy" except by sleight-of-hand. Responsible courts must resist the urge to make magic that way and continue to read and apply the law as it stands until legislatures gather the courage to make the necessary corrections.